



**Testimony of Naomi Karp**  
**AARP Public Policy Institute**

Judicial Council of California  
Probate Conservatorship Task Force

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AARP appreciates the opportunity to testify on the important issue of the Probate Courts' role in conservatorship cases and specifically on temporary conservatorships. I am Naomi Karp, an attorney and Senior Policy Advisor at AARP's Public Policy Institute. Since my days as a legal services attorney representing older people and people with disabilities, I have focused on, and been acutely concerned about, the rights and interests of vulnerable incapacitated individuals from both a practice and a policy perspective. AARP's national office is working closely with our California state office to support active legislative and other advocacy efforts in this key arena.

AARP's written policies support strong legal protections against all forms of exploitation and abuse of incapacitated and vulnerable adults, as well as strong procedural and substantive safeguards to protect individual rights. In the conservatorship area, the key is to balance needed court intervention to address abuse and neglect, and due process protections to protect individual autonomy to the greatest degree possible. Thus, AARP's Policy Book urges states to safeguard individual rights through "a process for emergency proceedings that includes actual notice to the respondent, mandatory appointment of counsel, proof of respondent's emergency, appropriate limitations on emergency powers, and termination upon showing that the emergency no longer exists."

I will focus today's testimony on the excellent issues listed in the invitation to participate in this panel. But first I'd like to outline a paradigm for a well-constructed temporary conservatorship process based on due process

requirements and an examination of other states' statutes. The process should be two-tiered, depending on the urgency of the facts at hand. A **temporary** conservatorship should be instituted under urgent but not emergent circumstances, should include key due process elements such as advance notice and hearing, and should be of short duration. An **emergency** conservatorship should be ordered on an ex parte basis to avoid imminent and major harm – in a *very small fraction of cases* – with appropriate notice, and hearing to follow in short order. Wyoming's statute incorporates this system and terminology of distinguishing temporary and emergency guardianships. These processes may be viewed as analogous to equity actions for injunctive relief, in which a plaintiff may seek a temporary restraining order immediately, a preliminary injunction with a little more notice and hearing, and finally a permanent injunction.

Now to your questions.

**Are current standards for establishment of temporary conservatorships appropriate?** The California Probate Code currently fails to articulate a standard for appointment of a temporary conservator beyond the vague phrase "good cause for appointment." The Code should include the basic criteria for appointment, which should be:

- "Good cause" concretely defined, with the definition conveying the principles that the incapacitated person is at risk of serious, imminent or emergent harm, and that additional harm will result if the general conservatorship process and timeframe is followed. Other states, including New Jersey, Oregon, Oklahoma and Minnesota, have specific language, and we will provide you with citations in detailed written comments to follow.
- No one currently has authority to act on behalf of the proposed conservatee – or an existing fiduciary is unwilling, ineffective or abusive.
- The petition states a factual basis for the need for temporary conservatorship.
- The court finds facts that constitute the urgent or emergency need.

- The conservator is given only those powers necessary to respond to the emergency.

**Should the courts be able to waive notice and, if so, under what circumstances?** Almost all states appear to permit waiver of advance notice of the proceeding in some emergency circumstances. Texas is the only state I'm aware of with a statute requiring advance notice of the proceedings without exception. However, notice should not be waived except in the most extreme circumstances.

The California Probate Code currently requires 5 days notice to the proposed conservatee "unless the court for good cause otherwise orders." Again, "good cause" should be defined, and defined extremely narrowly. Possible justifications for waiving advance notice include the following:

- the proposed conservatee lives with a caregiver who is actively dissipating assets, and giving notice to the proposed conservatee serves as notice to the abuser who may take drastic action before the court can intervene
- a kidnapping
- a severe health problem requiring immediate treatment when the proposed conservatee can't or won't seek treatment
- other dire circumstances in which waiting even a couple of days may mean that serious irreparable harm will ensue.

One way to limit the number of emergency cases requiring waiver of notice before the court acts is to provide for a shorter notice period when an emergency is alleged. For example, Oregon and Minnesota require two days notice and Oklahoma requires 72 hours. Also, it is critically important that the temporary conservatee get notice *at some point*, shortly after the emergency appointment if not before, and an opportunity to contest the appointment. Wyoming and Minnesota, for example, require notice within 48 hours after an ex

parte order. This allows the temporary guardian to take immediate protective action and informs the conservatee as soon as it is safe to do so.

**What role should court investigators play?** This is a difficult question due to resource limitations. However, investigators play a key role in the conservatorship process when they inform the respondent of the impending case, and of the right to oppose the appointment, to attend the hearing, to be represented by legal counsel, and to have counsel appointed by the court if the respondent has no independent counsel. We recommend that this function be included in the temporary conservatorship process, either before the hearing or, in those unusual cases requiring an ex parte emergency appointment, within 48 hours after the appointment. Maine requires a similar procedure.

Alternatively, if counsel is appointed upon filing of the petition in every case, there may be diminished need for the investigator's immediate visit. Florida and Arizona, for example, mandate appointment of counsel in emergency guardianship proceedings, and we support this requirement.

**Are the powers and duties granted to temporary conservators appropriate?** Courts should limit the temporary conservator's powers to those essential for dealing with the urgent or emergent situation giving rise to the petition. Thus, the current code language is too broad. New Jersey, for example, limits the temporary guardian to providing "only for those services determined by the court to be necessary to deal with critical needs or risk of substantial harm to the alleged incapacitated person..." Other state statutes are similarly restrictive.

Probate courts should specify the temporary conservator's limited powers and duties in the letters of temporary conservatorship, as is required in many other states. A check-off form could facilitate this process.

We have other suggestions for creating an efficient temporary conservatorship process that safeguards rights, and we will forward them in writing. Also, we are in the midst of a 2-year study of guardianship monitoring in collaboration with the American Bar Association Commission on Law and Aging. Our report on a national survey about court monitoring practices will be released soon, and we will provide this Task Force with findings relevant to its work.

Thanks again for the opportunity to testify, and I will gladly answer questions today or in the future.

## **NAOMI KARP**

Naomi Karp, J.D., is Senior Policy Advisor – Consumer Team at AARP’s Public Policy Institute. For 10 years she was a legal services attorney representing low-income and elderly clients. Since 1988, she has worked at the intersection of law, aging and public policy. From 1988 – Feb., 2005, she was on the staff of the American Bar Association (ABA) Commission on Law and Aging. At the ABA, her areas of focus included guardianship, healthcare decision-making, elder abuse, dispute resolution, disability issues, and long-term care. Her activities included research, technical assistance to the public and private bar, legislative and administrative advocacy, training, and collaborative policy work with non-profits and government. She received support from foundations including the Robert Wood Johnson Foundation, Henry J. Kaiser Family Foundation, William and Flora Hewlett Foundation, the Commonwealth Fund, AARP Andrus Foundation as well as the Administration on Aging, Centers for Medicare and Medicaid Services and the State Justice Institute. Key research projects focused on: public guardianship; dementia and Medicare managed care; health care decision-making for “unbefriended” older persons; Medicaid estate recovery; resolving consumer disputes in managed care; and aging, disability and dispute resolution. She has written numerous reports, journal articles and other publications on these topics.

At AARP, Ms. Karp is responsible for research and developing policy positions regarding elder abuse, guardianship, probate and other legal rights issues. She has convened internal working groups on the Elder Justice Act and on guardianship and alternatives. With the ABA Commission on Law and Aging, she is conducting a study of adult guardianship monitoring. AARP’s National Policy Council (NPC) has been charged by AARP’s Board of Directors with investigating and reporting on the issue of “Decision-Making for Incapacitated Adults: Are Adequate Systems in Place?” Ms. Karp has taken the lead in educating the NPC on this topic, arranging site visits, and conducting other events exploring this charge.